

MOTION FILED
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No. 82-1075

IN THE

Supreme Court of the United States

October Term, 1982

**CPG PRODUCTS CORP. AND GENERAL MILLS
FUN GROUP, INC.,**

Petitioner,

v.

ANTI-MONOPOLY, INC.,

Respondent.

**MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE AND BRIEF OF AMICUS CURIAE THE TOY
MANUFACTURERS OF AMERICA, INC., IN SUPPORT
OF A PETITION FOR WRIT OF CERTIORARI**

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America, Inc.*

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**MOTION FOR LEAVE TO FILE
BRIEF *AMICUS CURIAE***

The Toy Manufacturers of America, Inc. hereby respectfully moves for leave to file the attached brief *Amicus Curiae* in this case. The consent of the attorneys for petitioner has been obtained. The consent of the attorneys for respondent was requested but refused.

The interest of the Toy Manufacturers of America, Inc. in this case arises from its role as a trade association representing numerous manufacturers and marketers of toy products under various federally-registered trademarks.

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I.**Questions Presented**

I. Whether the Court of Appeals for the Ninth Circuit erred in concluding that a valid trademark, "MONOPOLY", denoting a unique type of real estate board game manufactured, promoted and protected by a single producing company (Parker Brothers), became generic.

II. Whether Rule 52(a) of the Federal Rules of Civil Procedure prohibits a Court of Appeals from substituting its findings declaring a trademark invalid as "generic" for the contrary factual findings of a District Court in view of the District Court's unique position as a trier of fact to evaluate the weight and credibility of opinion survey evidence and expert testimony.

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**BRIEF OF *AMICUS CURIAE*,
THE TOY MANUFACTURERS OF AMERICA, INC.,
IN SUPPORT OF A PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT**

Interest of the *Amicus Curiae*

The Toy Manufacturers of America, Inc. is a trade association of toy manufacturers (including the petitioner) many of whom hold widely recognized trademarks on toys and games, as well as other consumer products.

REASONS FOR GRANTING THE WRIT

I.

Introduction

The primary issue before this Court involves the holding of the Ninth Circuit Court of Appeals, based on a single controverted survey, that the "MONOPOLY" trademark became "generic" in contemporary usage over a period of time because consumers primarily purchase the game "MONOPOLY" to obtain the product itself and only secondarily because it denotes the producer, Parker Brothers.

The Court of Appeals' holding should not go unreviewed by this Court. In the absence of this Court's review, the Court of Appeals' judgment will establish a precedent which could lead to the catastrophic loss of trademark protection for countless merchandisers, including petitioner's members, on a national level.

By overruling the considered judgment of a District Judge who had weighed the proof presented to him, including expert testimony, the Court of Appeals exceeded the bounds set by Rule 52 (a) of the Federal Rules of Civil Procedure. While acknowledging the "clearly erroneous" standard and this Court's very recent pronouncements on the limited role of appellate courts in reviewing factual inferences and determinations made by district judges, the Court of Appeals actually exceeded its powers by substituting its own factual findings for those of the District Court.

II.

The Ninth Circuit Court of Appeals' Establishment of an Erroneous Test for Genericness Unreasonably Alters Existing Trademark Law and Threatens the Existence of Most Valid Trademarks in the United States.

The Court of Appeals' rationale virtually assures that a single motivation survey can be utilized in the defense of any trademark case to establish the generic invalidity of a trademark. Ignoring the many faceted functions of trademarks, the Court of Appeals rests its decision entirely on the results of a single controverted public opinion survey in which the majority of those surveyed indicated their preference for a unique real estate board game made by a single producer and only secondarily indicated their preference for the producer of the game.

The Court's rationale suggests, in contravention of the overwhelming product-denoting significance of existing trademarks, that a trademark's principal significance must only be found in primary public identification of the producer.

The Court of Appeals erroneously based its determination that "MONOPOLY" became an invalid trademark denoting a "generic" name upon an arbitrary and unreasoned review of survey evidence and expert testimony accepted by the District Court.

Little weight, if any, was given by the Court to the Parker Brothers brand name "Teflon" survey, which was a product-source significance survey on genericness for which there is a court approved model reported in *E.I. DuPont de Nemours & Co. v. Yoshida International, Inc.*, 393 F.Supp. 502 (E.D.N.Y. 1975).

Respondents to the survey who identified "MONOPOLY" as a product of one manufacturer were asked whether they could identify the manufacturer. 63% of the respondents identified "MONOPOLY" as a brand name, 56% as a product made by one manufacturer, and 55% identified Parker Brothers as the source of the product. The survey results demonstrate that the primary significance of "MONOPOLY" is that it is perceived as a *brand name* which primarily denotes a games producer. The Court of Appeals erroneously and arbitrarily viewed the survey as "having no relevance to the case." 684 F.2d 1323. Instead, the Court chose to ignore the source-denoting function of the survey despite the fact that Parker Brothers' diligent promotion and policing of its mark resulted in 63% of the respondents identifying "MONOPOLY" as a brand name and 55% of the respondents identifying Parker Brothers as the source of the brand.

Conversely, the Court chose to give extraordinary credence to the Anti-Monopoly surveys. In spite of the fact that the Appellate Court conceded the flaws inherent in the Anti-Monopoly "Thermos" type survey, which asked respondents if they were familiar with a real estate trading board game, the court erroneously accepted as conclusive the survey result that 80% of those respondents familiar with real estate board games would tell the salesclerk they wanted "MONOPOLY". The Court of Appeals passed over the deficiencies in the survey and stated:

In one of its briefs, General Mills points out that the survey used in the 'Thermos' case was described as 'generically corroborative of the court's conclusions drawn from other evidence,' and that the district court which decided the 'Teflon' case found a 'Thermos'-like survey defective because 'the design of the questions

more often than not [focused] on supplying the inquirer a 'name,' without regard to whether the principal significance of the name supplied was its indication of the nature or class of an article, rather than an indication of its origin, '*King-Seeley Thermos Co.*, supra, 321 F.2d at 580.' *E.I. Du Pont de Nemours & Co.*, supra, 393 F.Supp. at 527. Be that as it may, we think that the results of this survey are compelling evidence of a proposition that is also dictated by common sense; an overwhelming proportion of those who are familiar with the game would ask for it by the name MONOPOLY. 684 F.2d 1323-24.

In giving special weight to the "Motivation" survey conducted by Anti-Monopoly, the Circuit Court noted that the survey was a reasonable effort to determine the sense in which the purchaser used the word "MONOPOLY" when asking for the game by that name. 92% of those surveyed were aware of "MONOPOLY"; 65% chose the game primarily because of their interest in playing it; and 32% chose "MONOPOLY" because they liked Parker Brothers' products. The Court incorrectly held that deficiencies in the survey were not plausible and dismissed as inconsequential the fact that the survey was created by Prof. Anspach and was based upon a lay interpretation of the Appellate Court's opinion; that the survey was overwhelmingly prone to error of subjective grading by Anti-Monopoly; and that the survey evidences an inherent bias in the language chosen. 684 F. 2d at 1325.

Departing from the principle that trademarks serve a number of desirable and lawful functions, the Court of Appeals, in relying on the Anti-Monopoly surveys, ignores the fact that most consumers choose a particular product

because they want or need that product.¹ The Court makes the continued viability of valid trademarks dependent upon a single function—whether, according to survey, the public majority can identify and purchase a product primarily because it is made by a certain producer. If such identification cannot be made, the Court of Appeals would invalidate valid trademarks as having become the common descriptive name of the product (generic) rather than identifying its source.

The novel doctrine applied by the Court totally ignores the realities of a trademark's effect on the marketplace. The District Court correctly recognized these realities:

One fact which this court need not ignore is that most consumers, indeed an overwhelming proportion thereof, purchase any given product not out of goodwill or affection for the producer, but because they want or favor the product. Only a shareholder of the General Mills Fun Group (Parker Brothers' parent) could reasonably be expected to purchase a Parker Brothers game out of an affection or goodwill for the corporation. Moreover, the 'primary significance' of a trademark corresponds more to the recognition of a mark as the brand name of a particular producer than it does to a reason for purchasing. Consumers purchase games because they wish to play the games they seek, yet this fact alone should not serve to invalidate an otherwise legitimate trademark. The makers of MONOPOLY should not be penalized simply because they

¹ See, e.g., 3R. Callman, *The Law of Unfair Competition, Trademarks and Monopolies*, §65 (3d ed. 1969) ("[t]he trademark may serve in several capacities, each unique unto itself"); Backman, *The Role of Trademarks in Our Competitive Economy*, 58 *Trademark Rep.* 219 (1968); Link, *The Social Significance of Trademarks*, 38 *Trademark Rep.* 622 (1948).

have created a unique product which they have actively and diligently promoted . . .

In a single producer case (there is not another producer of MONOPOLY) it will not suffice to analyze source-related as opposed to source-irrelevant characteristics because most source-related characteristics (e.g., price, style, durability, quality, etc.) are purely relative terms, implying a comparison with product substitutes, or near substitutes. Here there are no substitutes; there is only MONOPOLY. Accordingly, the Ninth Circuit's mandate that this court divine the 'primary significance' of that term in the consumer's mind must necessarily involve subtle inferences into the complex, convoluted mind of the American consumer—an unenviable task.

Yet, the cumulative weight of the evidence does satisfy this court that the primary significance of MONOPOLY in the public's eye is to denote a 'Parker Brothers' Game' (i.e., source) in contradistinction to that 'popular game of MONOPOLY' (product). Parker Brothers has expended substantial time, energy, and money in promoting and policing their trademark, expending over \$4 million in advertising expenditures. One result of the diligent efforts has been the extraordinary success Parker Brothers has achieved in creating public source awareness. Hence, source attribution is a dominant perceived effect of the MONOPOLY trademark. This court cannot say from the facts before it that it is not the 'primary significance' of the mark. Unless the Ninth Circuit standard is meant to foreclose the possibility of trademark protection for any producer of a unique game whose corporate name does not appear in the title of the game (e.g., 'SCRABBLE,' 'TOWER OF BABLE'), then its test cannot be

used here to thwart MONOPOLY's trademark rights.
515 F.Supp. 454-55.

III.

The Ninth Circuit Court of Appeals' Decision Misapplies the Precedents of This Court and Is at Odds With the Statutory Definition of a Trademark and the Decisions of All Other Circuits.

The Ninth Circuit Court's decision incorrectly distorts the definitive boundaries of trademark protection. The Lanham Act itself defies the court's rationale and defines "trademark" as "any word, name, symbol or device or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others." 15 U.S.C. § 1127.

Contrary to the Court's limited application of trademark protection to words or names exclusively denoting source under a "motivation" survey, numerous courts have recognized the importance of trademarks, as defined by the Lanham Act, in the competitive marketplace. In *Mishawaka Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203 (1942) this court clearly established the rationale that the very function of a trademark is to denote the product to which it is affixed.

The protection of trademarks is the law's recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them. A trademark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human pro-

pensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same—to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. Once this is attained, the trade-mark owner has something of value. If another poaches upon the commercial magnetism of the symbol he has created, the owner can obtain legal redress. 316 U.S. 205.

In *Coca-Cola Co. v. Koke Co.*, 254 U.S. 143 (1920) the Court in upholding the validity of the Coca-Cola mark stated:

The name now characterizes a beverage to be had at almost any soda fountain. It means a single thing coming from a single source and well known to the community. . . . [W]e see no reason to doubt that . . . it has acquired a secondary meaning *in which, perhaps, the product is more emphasized than the producer*, but to which the producer is entitled. 254 U.S. 146 (Emphasis Supplied).

In *Family Circle, Inc. v. Family Circle Associates, Inc.*, 332 F.2d 534 (3 Cir. 1964), the court recognized that with the advent of modern marketing techniques the purchasing public is even less aware of the identity of the producer of a particular trademarked product which it desires. "[O]wing to the ramifications of modern trade and international distribution of goods from the manufacturer to the jobber or importer and retailer to the consumer, the source or origin of the goods bearing a well-known trademark is seldom known to the consumer." 332 F.2d 539.

Furthermore, the Ninth Circuit decision misapplies the cited "ASPIRIN", "CELLOPHANE," and "THERMOS"

cases to this situation where a diligently policed trademark "MONOPOLY" functions by identifying both a unique product and the source of that product.²

The Ninth Circuit's singular error lay in its conclusion that, contrary to the effect of trademarks in today's marketplace, a trademark cannot identify the product as well as the producer.

IV.

The Ninth Circuit Has Exceeded Its Authority as an Appellate Court Under the Federal Rules of Civil Procedure.

The Court of Appeals erroneously overruled findings of the District Court. The District Court, 515 F.Supp. at 455, upon all the evidence, made a *factual finding* that "MONOPOLY" is and was at registration a valid source-denoting trademark entitled to all the protection the law affords. The District Court, 515 F.Supp. at 454, held that "the cumulative weight of the evidence does satisfy the court that the primary significance of 'MONOPOLY' in the public's mind is to denote Parker Brothers' Game (i.e., source) in contradistinction to that 'popular game' of Monopoly (product)." In support of its findings of fact that source attribution is a dominant perceived effect of the

² *Bayer Co. v. United Drug Co.*, 272 F. 505 (S.D.N.Y. 1921); *DuPont Cellophane Co. v. Waxed Products Co.*, 85 F.2d 75 (2d Cir.), *cert denied*, 299 U.S. 601 (1936); *King-Seeley Thermos Co. v. Aladin Industries, Inc.*, 321 F.2d 577 (2d Cir. 1963), all of which held well known trademarks to be generic where substantially the same products were manufactured by many different competitors and the owners of the trademarks had not adequately policed use of the names to preserve their non-generic quality and had used them in a generic manner in promotional and other literature in order to increase their popularity.

"MONOPOLY" trademark, the court noted expenditures by Parker Brothers of "substantial time, energy and money in promoting and policing their trademark," the extraordinary success Parker Brothers achieved in creating public source awareness ("Over 55% of the American public clearly identified Parker Brothers as the producer of the game") and the impressive display of the amount of goodwill which Parker Brothers has imbued through its various games—especially "MONOPOLY." 515 F.Supp. at 454-455.

The Court found further evidence of "MONOPOLY" as a source-identifying mark in the surveys submitted on remand and the testimony of 16 witnesses at the trial regarding public perception of "MONOPOLY" as a valid mark, as well as the confusion as to source in the public's mind brought about by the marketing of Anti-Monopoly. 515 F.Supp. at 448.

It was found that the majority of the American public understands that "MONOPOLY", when used with games or game equipment, indicates the source of the goods. The public's understanding is that there is a particular game called "MONOPOLY" produced by a single manufacturer (Parker Brothers) and that such a game is a "species" of the larger generic term "real estate trading game equipment".

In spite of these District Court findings of fact and its determination that "MONOPOLY" is a valid mark, the Court of Appeals erroneously invalidated the District Court's findings in a decision contrary to Rule 52(a) of the Federal Rules of Civil Procedure. It thus warrants review by this Court.

Rule 52(a) of the Federal Rules of Civil Procedure provides that in cases tried without a jury, the trial court's finding of fact cannot be set aside unless clearly erroneous.

This has been interpreted to mean that the trial judge's finding of fact cannot be set aside unless, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 33 U.S. 384, 395 (1948).

Although the Court of Appeals correctly agreed with the trial court's finding that "MONOPOLY" was a valid trademark at registration,

we are faced with the following legal question: if a game is known about by a small number of people and they all call it by a particular term, may one member of the group appropriate that name by registering it as a trademark . . . We have concluded that the evidence, construed most favorably to Anti-Monopoly, does not show that 'Monopoly' had become generic before Parker Brothers registered it as its trademark. . . . When a small number of people use a particular thing and call it by a particular name, one which is not a common descriptive term for the thing, a person may appropriate the name and register it as a trademark. 684 F.2d at 1321.

it erred in overruling the District Court's finding by holding that since its registration "MONOPOLY" had become a "generic" term.

The District Court finding of fact that "MONOPOLY" is a valid trademark cannot be set aside by the Court of Appeals' bald and unsupported statements that the Trial Court's finding of fact was clearly erroneous.

The reasoning of the Court of Appeals is tenuous at best. The Court dismisses out-of-hand or ignores the extensive findings of the District Court herein mentioned with propo-

sitions that are both inappropriately applied and vague. In considering whether the findings of the District Court were "clearly erroneous," the Appellate Court reasoned:

We have in mind an obvious proposition. The word 'Monopoly,' while not in its ordinary meaning descriptive of the game 'Monopoly', is an ordinary English word, and it does describe the objective of the game. This was recognized in the rules of the game published by Parker Brothers in 1935. They begin with:

BRIEF IDEA OF THE GAME

THE IDEA OF THE GAME is to BUY and RENT or SELL properties so profitably that one becomes the wealthiest player and an eventual **MONOPOLIST**.

A Monopolist has a monopoly. By choosing the word as a trademark, Parker Brothers has subjected itself to a considerable risk that the word would become so identified with the game as to be 'generic'. 684 F.2d at 1322.

The Appellate Court admits that General Mills and its predecessor spent time, energy and money promoting and policing the use of the term "MONOPOLY", that over 55% of the public has come to associate the product and the name "MONOPOLY" with Parker Brothers, and that one-third of the public who purchased the game did so because they liked Parker Brothers' products. Yet the Court incorrectly reasons that these facts do not show that "MONOPOLY" is a valid mark. Instead, the Court erroneously relies on vague reasoning that all Parker Brothers and General Mills got for their money and efforts was a generic term.

To us, the evidence overwhelmingly shows that they very successfully promoted the game Monopoly, but

that in doing it they so successfully promoted 'Monopoly' as 'the name of the game' that it became generic in the sense in which we use that in trademark law. We recognize that 'there is evidence to support' the trial court's findings, 33 U.S. at 395, but 'on the entire evidence [we] are left with the definite and firm conviction that a mistake has been committed.' 684 F.2d at 1323.

To allow the Court of Appeals' reasoning to obliterate "MONOPOLY" as a valid trademark based upon a single "motivation" survey would open the floodgates of litigation and set a precedent for the chaotic and widespread misapplication of trademark laws.

CONCLUSION

In view of the foregoing and for the protection of both trademark owners and the public, the Toy Manufacturers of America, Inc. respectfully submits the petition for a Writ of Certiorari to the Court of Appeals for the Ninth Circuit should be granted.

Dated: January 22, 1983

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